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Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT LONG and KELLY LONG,

Petitioners,

v.

JIMMIE RAY SLATON, JR. and RONNIE WILLIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeal's opinion in this case improperly expands or abrogates current Fourth Amendment law, which limits the use of deadly force when seizing an unarmed fleeing suspect to situations where the suspect poses an imminent or immediate threat of serious physical harm to the officer or others, or whether the Eleventh Circuit's opinion creates a split in the Circuits by focusing on the potential risk of harm posed by the fleeing suspect in the future as opposed to the actual threat of harm at the time of the seizure.

2. Whether a law enforcement officer may use lethal force against an unarmed fleeing suspect, who he knows to be mentally ill, when the suspect is backing away from the officer in a police cruiser on a gravel driveway in a rural, isolated area with only one egress to a county road, when backup is already en route.

3. Whether *Tennessee v. Garner* and *Vaughn v. Cox* "clearly established" that a law enforcement officer's use of deadly force to seize a fleeing, unarmed, previously non-violent, mentally ill suspect, while that suspect is backing away from the officer in a vehicle on a gravel driveway in a rural, isolated area with only one egress to a county road while backup is en route, is a violation of the suspect's Fourth Amendment rights.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Robert Long and Kelly Long, the heirs and representatives of the estate of Bryan Long, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007). It is reproduced in the Appendix at App. 1-22. The opinion of the District Court is unreported and is reproduced in the Appendix at App. 23-24.

JURISDICTION

On November 16, 2007, the Eleventh Circuit entered judgment. Appendix at App. 1-22. Robert Long and Kelly Long filed a timely petition for rehearing *en banc* on December 7, 2007. The Eleventh Circuit entered an order denying the petition on May 27, 2008. Appendix at App. 25-26. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INCLUDED

Petitioners Robert Long and Kelly Long seek damages for the violation of the Fourth Amendment rights of Bryan Long pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

STATEMENT

This is a 42 U.S.C. § 1983 action arising out of the fatal shooting of Bryan Long by Lauderdale County, Alabama Deputy Sheriff Jimmie Ray Slaton, Jr. on May 25, 2005 in the driveway of Mr. Long's home in a rural area outside of Florence, Alabama. Petitioners sued Slaton for violating Bryan Long's Fourth Amendment rights through the excessive use of deadly force when Bryan Long posed no imminent or immediate threat of serious physical harm to Deputy Slaton or others at the time he was fatally shot.[1] Based on the reasoning of the Eleventh Circuit, law enforcement officers may now use deadly force to

[1] Petitioners also sued Sheriff Ronnie Willis for his failure to train Slaton in the proper use of deadly force. Without addressing the merits, the Eleventh Circuit reversed the District Court's denial of Sheriff Willis' motion to dismiss on the grounds the Petitioners failed to state a viable claim against Slaton.

seize an unarmed suspect fleeing in a vehicle based on the ***potential*** harm that the suspect could cause.

1. Incident Giving Rise to Fatal Shooting

At the motion to dismiss stage of this case, the only facts before this Court are those alleged by Petitioners in their Complaint.

On May 25, 2005 Bryan Long resided at his father's home outside of Florence, Alabama. (R1-1-2). The shooting occurred on the Long property, which sits on 18 acres. (R1-1-2, 4). The Long home is approximately a half a mile away from the nearest neighbor's home. *Id.* The road that Long's driveway connects with has only one ingress and egress – a County road three quarters of a mile long. *Id.* Long's driveway is approximately 250 feet long. (R1-1-2, 3).

On May 25, 2005, Bryan Long's father, Dr. Robert Long, sought to have Bryan committed to a local hospital because of his belief that Bryan was suffering from a psychotic episode. (R1-1-3). Dr. Long was unable to have Bryan committed due to a lack of available hospital beds, so, on the way home, he called the Lauderdale County Sheriff's Department requesting assistance with Bryan due to his psychosis. *Id.* Dr. Long then arrived home and waited for the deputies to arrive. *Id.*

Shortly thereafter, Respondent Slaton, a Lauderdale County Deputy Sherriff, arrived alone, pulled up the 250-foot driveway, and parked behind Dr. Long's

vehicle. *Id.* Slaton left his keys in the ignition of his cruiser and left the driver's door open. *Id.* Slaton spoke with Dr. Long, who explained Bryan's mental illness and his desire for Bryan to be detained. *Id.* Dr. Long also advised Slaton that Bryan had ***not*** been physically violent with him. *Id.* Slaton was familiar with Bryan and had never had any major problem with him. (R1-1-4). Slaton then approached Bryan Long, informed him that he was going to jail, and pulled out handcuffs. (R1-1-3). Bryan voiced his disagreement, ran to Slaton's vehicle, and got inside. *Id.* Slaton ran to the driver's side of his vehicle, and threatened to shoot Bryan if he did not get out of the car. (R1-1-4). Bryan put the car in reverse and backed down the driveway, ***away*** from Slaton and Dr. Long. *Id.*

At the time Bryan Long began backing down his driveway away from Slaton, backup law enforcement was already en route. *Id.* At all relevant times, Bryan Long was unarmed. *Id.* When Bryan began backing down the driveway ***away*** from Slaton and Dr. Long, Slaton, without first attempting non-deadly force in an effort to stop Bryan, fired three shots at Bryan. (R1-1-4, 5). One shot went through the windshield and fatally struck Bryan in the left chest. (R1-1-4). Respondent Willis was, at all relevant times, the Sheriff of Lauderdale County and the supervisor of Slaton. (R1-1).

2. District Court Proceedings

Pursuant to 42 U.S.C. § 1983, Petitioners brought this action against Respondent Jimmie Ray Slaton, Jr. in his individual capacity alleging that his use of deadly force violated Bryan Long's constitutional rights. Petitioners also sued Sheriff Willis on the grounds that his department did not have a constitutionally compliant use of deadly force policy and/or that he failed to properly train Slaton regarding such use of deadly force policy. Respondents moved to dismiss qualified immunity grounds. (R1-7, R1-8). The District Court denied the Respondents' motion to dismiss in its entirety (Appendix at App. 23-24), and Respondents appealed.

3. Decisions of the Eleventh Circuit

Slaton and Willis appealed the District Court's denial of qualified immunity. The Eleventh Circuit reversed, finding that Petitioners' Complaint failed to state a claim for the violation of Bryan Long's Fourth Amendment rights on the grounds that Slaton's use of deadly force was reasonable in light of the potential harm Long posed to others. *Long v. Slaton*, 508 F.3d 576, 593 (11th Cir. 2007). The Eleventh Circuit alternatively held that even if there was a constitutional violation, that the law was not clearly established, despite its holding in *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir. 2003) in which the Eleventh Circuit found that officers were not entitled to qualified immunity in a case "more fraught with immediate

threat than those in the instant case." *Long*, 508 F.3d at 586 (Forrestor, J., dissenting).

Petitioners timely filed a petition for rehearing *en banc*, based on the panel's expansion or abrogation of Eleventh Circuit and Supreme Court precedent limiting the use of deadly force against an unarmed fleeing suspect to those situations where the suspect poses an imminent or immediate threat of serious bodily harm to the officer or others. The petition was denied. Appendix at App. 25-26.

REASONS FOR GRANTING OF THE PETITION

This Court should grant Petitioners' petition because the Eleventh Circuit's opinion creates a new standard, in contradiction of Supreme Court precedent, for determining when the use of deadly force to seize an unarmed fleeing suspect is reasonable. The Eleventh Circuit's opinion also creates a split in the Circuits by focusing on the potential risk of harm posed by the fleeing suspect in the future, as opposed to the threat of harm at the time of the seizure. The Eleventh Circuit's opinion further creates a split in the Circuits on the issue of whether the mere operation of a stolen police cruiser by a fleeing suspect who is in an altered state of mind constitutes a threat of harm justifying the use of deadly force. Furthermore, the Eleventh Circuit's finding that Bryan Long's mental state was a justification for the use of deadly

force has serious public policy implications for the mentally ill.

I. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO ELEVENTH CIRCUIT AND SUPREME COURT PRECEDENT.

"A police officer may not seize an unarmed, non dangerous suspect by shooting him dead" and "the use of deadly force to prevent the escape of all felony suspects whatever the circumstances, is unconstitutionally unreasonable." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701 (1985). Thus, a law enforcement officer may only

> use deadly force to seize a fleeing felony suspect when the officer (1) 'has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others' or 'that he has committed a crime involving the infliction or threatened infliction of serious physical harm;' (2) reasonably believes that the use of deadly force was necessary to prevent escape; *and* (3) has given some warning about the possible use of deadly force, if feasible.

See, *Vaughan v. Cox*, 343 F.3d at 1323, 1329-30 (11th Cir. 2003) (citing to and discussing *Garner*). The threat of serious physical harm under (1) must be immediate or imminent. *Id. See also, Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769, 1779 (2007) (finding officer's use of deadly force reasonable where car chase initiated by respondent "posed a substantial

and immediate risk of serious physical injury to others").

However, in holding that Slaton's use of deadly force against Long was reasonable, the Eleventh Circuit based its decision on the "potential" danger Long posed as a mentally-unstable suspect in control of a police vehicle. *Long*, 508 F.3d at 582-83. By focusing only on speculative future dangers Long *might* have posed to others – and by disregarding, if not conceding, that Bryan posed no immediate danger – the Eleventh Circuit's decision directly contradicts the Supreme Court's decisions in *Scott* and in *Garner*, 471 U.S. at 11, 105 S. Ct. at 1701 (1985) ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.").

Despite long-standing precedent requiring that an unarmed, fleeing suspect pose an imminent or immediate threat to the officer or others before an officer can use deadly force to seize him, the Eleventh Circuit nonetheless based its ruling on the potential, rather than immediate threat of harm Bryan Long posed. The Eleventh Circuit acknowledged that Long "had not yet used the police cruiser as a deadly weapon" but then went on to hold that Slaton's shooting of Long was a reasonable "means of preventing Long's escape and preventing ***potential*** harm to others." *Long*, 508 F.3d at 583 (emphasis added).

Although the Eleventh Circuit cited to several cases for the proposition that the threat of danger is to be assessed not just at the moment, but also if the chase went on (*Id.* at 582-83), the cases cited all involve prior or more immediate threatening or violent conduct by the fleeing suspect. *See, Pace v. Capobianco*, 283 F.3d 1275, 1277 (11th Cir. 2002) (suspect continued high speed chase in demonstratively dangerous way, "almost hit an elderly motorist head-on" and turned his car toward pursuing officers); *Blanford v. Sacramento County*, 406 F.3d 1110, 1116-19 (9th Cir. 2005) (suspect with sword attempting to enter possibly occupied house); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) (suspect carrying sawed-off shotgun on city streets refused repeated orders to drop gun which he had already fired).

Thus, although the Eleventh Circuit acknowledged the "imminent or immediate threat of serious physical harm" requirement, it nevertheless applied a new standard involving the potential risk of harm. This new standard expands, if not abrogates, the Supreme Court's long line of precedent from *Garner* through *Scott*. Therefore, the Eleventh Circuit's opinion merits review by the Supreme Court.

The Eleventh Circuit opinion also contradicts its own precedent, as well as *Garner*, in holding that the law was not clearly established that shooting Bryan Long under the circumstances in this case would violate Long's constitutional rights. As of May 25, 2005, the law in the United States was clearly established that an officer may not use deadly force

against a fleeing suspect unless that suspect poses an imminent risk of serious physical harm. *Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701. A general constitutional rule can provide fair warning to officers that their conduct violates a constitutional right, "even though the very action in question has [not] previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516 (2002). In fact, officers can "be on notice that their conduct violates established law even in novel factual circumstances." *Id.* (rejecting requirement that prior cases be fundamentally similar).

While the general constitutional rule established by *Garner* provided sufficient "fair warning" to officers, the Eleventh's Circuit's opinion in *Vaughan v. Cox* provided even further notice to officers that shooting a suspect fleeing in a vehicle was unlawful where the suspect had not first driven such vehicle in a manner which posed an imminent threat of serious physical harm to the officer or others. 343 F.3d at 1331. If the law was clearly established as of May 25, 2005, that the use of deadly force could be considered unlawful under the more egregious facts in *Vaughan* (shooting into a stolen vehicle that had resisted two rolling roadblock attempts on a United States Interstate and was moving toward heavier traffic in a metropolitan area), then the law was also clearly established that shooting a fleeing, unarmed, previously non-violent, mentally ill suspect, while that suspect is backing away from the officer in a vehicle on a gravel driveway in a rural, isolated area with

only one egress to a county road while backup is en route, would be a violation of the suspect's Fourth Amendment rights. *See also, Dukes v. Miami-Dade County*, 232 F. App'x 907, 912-13 (11th Cir. 2007) (unpublished) (holding that the plaintiffs "sufficiently alleged a constitutional violation that is clearly established" where complaint alleged that a police officer shot one of the plaintiffs as he tried to break free of a police vehicle blockade of his car). Because the Eleventh Circuit's opinion contradicts its precedent in *Vaughan* and *Dukes* and Supreme Court precedent in *Garner* and *Hope*, this opinion should be reviewed by the Supreme Court.

II. THE ELEVENTH CIRCUIT DECISION CREATES A SPLIT IN THE CIRCUITS BY CONCLUDING THAT SLATON'S USE OF DEADLY FORCE WAS REASONABLE IN LIGHT OF THE *POTENTIAL* HARM THAT BRYAN LONG COULD HAVE CAUSED.

The Eleventh Circuit's holding that Slaton's use of deadly force was reasonable, because of the potential risk of harm that Long posed to others, conflicts with the law in other Circuits, which determine reasonableness based upon the threat to the officer or others at the time of the shooting. For example, in the factually similar case of *Smith v. Cupp*, 430 F.3d 766, 769-70 (6th Cir. 2005), the plaintiff, who had been placed in the back of a police cruiser in a McDonald's parking lot, stole the police cruiser and attempted to leave the parking lot. The officer fired four shots at

the plaintiff, striking him with the final shot. *Id.* at 770. The facts, as taken in the light most favorable to the plaintiff, were that the plaintiff was trying to flee the scene, was not trying to run over the officer and that "all of the shots were fired either after the cruiser was passing [the officer], or, at the very earliest, while the cruiser was passing [the officer] with the officer on the driver-side of the vehicle." *Id.* Based on this evidence, the Sixth Circuit held that the officer's use of deadly force was unreasonable because the shots were fired after the cruiser was past him; therefore, there was no immediate danger to anyone in the vicinity. *Id.* at 774.

Thus, the Sixth Circuit's decision was based upon the threat that the fleeing suspect posed ***at the time of the shooting*** and not at some potential point in the future. In fact, the Sixth Circuit addressed the issue of the plaintiff driving off in a police cruiser and specifically held that "[a]lthough there was some danger to the public from Smith's driving off in a stolen police car, ***the danger presented by Smith was not so grave as to justify the use of deadly force.***" *Id.* (emphasis added). Furthermore, Long's mental condition does not distinguish this case from *Cupp*, as the suspect in *Cupp* was believed "to be somewhat impaired." 430 F.3d at 769.

Where the Eleventh Circuit's opinion found that Long's operation of a police cruiser was one of two factors justifying the use of deadly force, the Sixth Circuit's decision in *Cupp* found exactly the opposite – that the mere fact that the suspect, in an altered state of mind, fled in a police cruiser did not pose a

threat justifying the use of deadly force. Furthermore, the Sixth Circuit assessed the threat at the time of the shooting as opposed to a potential future threat. *See also, Abraham v. Raso*, 183 F.3d 279, 293 (3rd Cir. 1999) (denying qualified immunity to an officer who shot an intoxicated, fleeing shoplifting suspect based on evidence that shots were fired at the suspect from the side of his car as the suspect was backing away from officer, even though in a mall parking lot where suspect had hit a parked car and resisted commands to get out of his car); *Sigley v. Parma Heights*, 437 F.3d 527, 537 (6th Cir. 2006) (denying qualified immunity where issue was whether shots into fleeing car were fired as suspect was threatening to run over officer or when officer was running alongside the car); *Tubar v. Clift*, 453 F.Supp.2d 1252, 1257 (W.D. Wash. 2006) (denying qualified immunity where stolen car posed no threat to officer because it was driving past him, rather than at him, at the time the third and fatal shot was fired at the fleeing suspect, even if the officer acted reasonably when firing the first two shots).

In other cases involving a suspect fleeing in a car being shot by an officer, other Circuits, like the Sixth Circuit, have also found the use of deadly force unreasonable based upon the threat of harm posed at the time of the shooting. For example, in *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993), the key issue was whether or not the officer stepped in front of the plaintiff's vehicle as the plaintiff was attempting to flee, with the Seventh Circuit finding

that the use of deadly force would only be permitted if the plaintiff accelerated toward the officer. Like in *Cupp*, *supra*, the Seventh Circuit's determination of the reasonableness of the use of deadly force focused on the threat posed at the time of the shooting and whether the officer's life was threatened at that time. The Seventh Circuit went on to note that "whether the [vehicle] presented a threat of serious physical harm has not been conclusively established" (*Id.*, n. 1) and that "fleeing felons who have not resorted to violence are accorded less intrusive seizures." *Id.* This latter statement conflicts and therefore splits with the Eleventh Circuit's holding that "[e]ven if Deputy Slaton's decision to fire his weapon was not the best available means of preventing Long's escape and preventing potential harm to others, we conclude that Slaton's use of deadly force was not an unreasonable means of doing so." Thus, a non-violent fleeing felon in the Seventh Circuit is afforded less intrusive means of seizure, but in the Eleventh Circuit that same non-violent fleeing felon is allowed to be shot to death. These differing results should be reviewed and reconciled by the Supreme Court.

III. THIS CASE HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS FOR THE MENTALLY ILL.

This case presents questions of exceptional importance to the mentally ill and their families. The Eleventh Circuit's opinion now allows a law enforcement officer to shoot a mentally ill fleeing suspect because

of the unpredictability of that mentally ill suspect's behavior, even if that suspect had not previously acted in a violent or threatening manner. *See, Long*, 508 F.3d at 581 (stressing Long's mental instability and unpredictable behavior). Therefore, the same mental illness that could explain conduct, or serve as a defense to a crime or a basis not to impose the death penalty, is now a justification for the use of deadly force in the Eleventh Circuit. Thus, while a state may not execute a mentally ill person,[2] law enforcement officers can now be judge, jury and executioner of the fleeing mentally ill.

Although the Eleventh Circuit emphasized that Bryan fled in a police vehicle, *any* passenger vehicle can be used as a dangerous weapon. *See, e.g., Robinson v. Arrugueta*, 415 F.3d 1252 (11th Cir. 2005) (finding that a Ford Escort was used as a dangerous weapon). And although the majority emphasized Slaton warned Bryan before his fatal shot, warnings must be given only "where feasible." *Garner*, 471 U.S. at 11-12, 105 S.Ct. at 1701-02. With those two considerations in mind, a reasonable officer may well conclude, based on *Long*, that he may employ lethal force against any suspect who appears mentally unstable and is fleeing in an automobile, regardless of whether that suspect poses an immediate risk of serious danger to others. The Supreme Court's Fourth Amendment jurisprudence

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[2] *See, e.g., Ford v. Wainright*, 477 U.S. 399, 408, 106 S. Ct. 2595, 2601 (1986) (noting that no state allows execution of the insane).

forbids such a result. In ruling on the Fourth Amendment question, the Eleventh Circuit erred by adopting an effective *per se* rule that police may shoot at mentally ill suspects fleeing in vehicles, and inappropriately regarded Bryan's non-threatening mental condition as a factor in favor of using lethal force.

CONCLUSION

This petition should be granted because the Eleventh Circuit's opinion in this case significantly departs from twenty-three years of Supreme Court precedent by considering the potential risk of harm posed by a fleeing suspect to determine the reasonableness of an officer's use of deadly force, rather than considering whether the suspect posed an imminent or immediate threat of harm as required by *Garner* and its progeny. Additionally, the Eleventh Circuit's opinion creates a split among some of the Circuits in the application of *Garner* and its progeny. First, the Eleventh Circuit's opinion splits with other Circuits by considering the potential and future threat of the fleeing suspect, rather than the threat posed by the suspect at the time of the use of deadly force. Second, the Eleventh Circuit's opinion is in direct conflict with the Sixth Circuit's determination that a fleeing suspect's mere operation of a stolen police cruiser in an attempt to flee is not sufficient justification for the use of deadly force, even if that fleeing suspect is in an altered state of mind.

Further, the Eleventh Circuit's holding that deadly force is reasonable even if not the best means available to seize a non-violent fleeing suspect splits with those circuits holding that non-violent fleeing suspects are to be afforded less intrusive means of seizure. Finally, the Eleventh Circuit's opinion has serious public policy implications for the mentally ill, as the opinion appears to create a bright line rule that an officer may shoot any mentally ill person attempting to flee in a vehicle, regardless of whether that mentally ill person had previously engaged in violent or threatening conduct.

For the foregoing reasons, Petitioners respectfully request that the decision of the Eleventh Circuit granting qualified immunity be summarily reversed, or alternatively, that writ of certiorari be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14439

D. C. Docket No. 06-01014-CV-3-IPJ

ROBERT R. LONG,
KELLY L. LONG,
as Personal Representatives of the
Estate of Bryan L. Long, deceased,

Plaintiffs-Appellees,

versus

JIMMIE RAY SLATON, JR.,
RONNIE WILLIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(November 16, 2007)

Before EDMONDSON, Chief Judge, HULL, Circuit Judge, and FORRESTER,* District Judge.

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* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

EDMONDSON, Chief Judge:

This appeal involves deadly force, the Fourth Amendment, and qualified immunity. Jimmie Slaton ("Deputy Slaton" or "Slaton") and Ronnie Willis ("Sheriff Willis" or "Willis") (collectively, "Defendants") appeal the district court's denial of their motion to dismiss on qualified immunity grounds this section 1983 suit arising out of the death of Bryan Long ("Long"). Dr. Robert R. Long ("Long's father") and Kelly Long (collectively, "Plaintiffs"), representatives of Long's estate, filed suit against Defendants in their individual capacities. Plaintiffs' complaint alleges that Deputy Slaton shot and killed Long in violation of Long's "civil rights."[1] Because we conclude that Plaintiffs' complaint fails to state a claim for a violation of Long's Fourth Amendment rights and that the applicable law was not already clearly established at the pertinent time, we reverse the district court's order.

I. Background

The complaint alleges these facts. In May 2005, Long's father, a medical doctor, went to the Lauderdale County Probate Court seeking to have Long committed to a hospital because Long was suffering from a "psychotic episode." But Long's father was unable to have Long committed because of a lack of available hospital beds. While returning to his

[1] On appeal, Plaintiffs are arguing the Fourth Amendment.

residence,[2] Long's father called the Lauderdale County Sheriff's Department and requested assistance due to Long's psychosis. Upon arrival at his home, Long's father waited in his vehicle for help to arrive.

Deputy Slaton responded to the call and arrived at the Long residence shortly thereafter. Slaton, who was alone, got out of his marked sheriff's cruiser,[3]

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[2] The complaint states that the Long residence is located on the outskirts of Florence, Alabama, on an 18-acre lot. The nearest neighbor is about half a mile away. The property's 250-foot driveway connects to a county road.

[3] Plaintiff's complaint refers to Deputy Slaton's vehicle as a "cruiser." The word "cruiser" is defined as "a police-car that patrols the streets," from which we infer that Deputy Slaton's vehicle was a marked sheriff's patrol vehicle. *See* 4 Oxford English Dictionary 80 (2d ed. 1989) (1928). Although we rely on the ordinary meaning of the term "cruiser" as a marked police patrol vehicle, this fact (which no one has disputed) is directly supported by an investigative report from the Alabama Bureau of Investigation, which Plaintiffs submitted to the district court as an attachment to Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss. The report indicates that the vehicle was a marked sheriff's cruiser complete with county tags, a flashing light bar on the roof, two police radios, and other emergency equipment. At the 12(b)(6) stage, we "primarily consider the allegations in the complaint," but "[t]he court is not [always] limited to the four corners of the complaint." 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 at 376-77 (3d ed. 2004). Because Plaintiffs submitted the investigative report in opposing Defendants' motion to dismiss and because the document's authenticity and veracity are in this case unchallenged, we look to the report to confirm that the ordinary meaning of "cruiser" applies as an undisputed fact for Deputy Slaton's sheriff's cruiser.

leaving the keys in the ignition and the driver's door open. Slaton then spoke to Long's father, who explained his desire that Long be detained due to Long's psychosis. When Deputy Slaton asked Long's father if Long had been physically violent with him, the father responded, "no."

Deputy Slaton then approached Long, who was at the end of the driveway, close to the house. Slaton pulled out handcuffs and told Long that Slaton would take Long to jail. Long voiced his disagreement and then ran over to and got inside Slaton's cruiser and closed the door. Slaton then ran to the driver's side of the cruiser, pointed his pistol at Long, and ordered Long to get out of the cruiser. Deputy Slaton threatened to shoot Long if Long did not comply. Long then shifted the cruiser into reverse and began backing away and down the driveway toward the road. Slaton stepped into the middle of the driveway and fired three shots at Long as the sheriff's cruiser moved away. One shot went through the windshield and struck Long in the chest. The cruiser stopped as it rolled into an embankment, and Long died after about a minute. At the time, backup law enforcement was en route.[4]

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[4] The complaint also alleges that Deputy Slaton was under the influence of an illegal drug, as evidenced by these facts: (1) a marijuana cigarette was found in the sheriff's cruiser after the shooting; (2) Slaton was never tested for drugs after the shooting; and (3) Long's body tested negative for marijuana. This allegation, however, has no application in the *objective* Fourth

(Continued on following page)

II. Discussion

We review *de novo* a trial court's denial of a motion to dismiss a complaint on qualified immunity grounds.[5] *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325, 1327 (11th Cir. 2003). In determining

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Amendment analysis of whether an objectively reasonable officer, facing the circumstances in this case could lawfully use deadly force. *See Graham v. Connor*, 109 S. Ct. 1865, 1872 (1989) ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."). Plaintiffs argue that whether Deputy Slaton was under the influence of marijuana is relevant to the reasonableness of his overall acts. But the Fourth Amendment issue is whether an officer reasonably could have used deadly force when confronted with the situation at the scene, not whether a reasonable officer would have smoked marijuana before arriving. We judge the application of force to see if it was excessive, not the particular officer's qualities.

[5] The district court denied Defendants' motion to dismiss the day after briefing was completed on the motion and with no explanation, stating simply that the court was "of the opinion that the motion to dismiss is due to be denied." This kind of order is of no help to an appellate court. In addition, such a summary denial of qualified immunity does not clearly demonstrate that the district court had entirely taken to heart the Supreme Court's instruction to courts about the duty to treat seriously motions raising immunity and to grant qualified immunity at the earliest possible point in the litigation. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987) (rejecting the argument that qualified immunity cannot be granted before discovery and stating that "qualified immunity questions should be resolved at the earliest possible stage of a litigation"); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815 (1985) (stating that the "entitlement" of qualified immunity is "*immunity from suit* rather than a mere defense to liability").

whether Plaintiffs' complaint alleges the violation of a clearly established right, we accept the allegations in the complaint as true and draw all reasonable inferences therefrom in favor of the Plaintiffs. *Id.* We first ask whether a constitutional violation occurred; we then ask whether the violation was already clearly established by the law at the time. *Saucier v. Katz,* 121 S. Ct. 2151, 2156 (2001).

A. Excessive Force and the Fourth Amendment

We first examine whether Deputy Slaton's use of deadly force was excessive and violated the Fourth Amendment. The standard for whether the use of force was excessive under the Fourth Amendment is one of "objective reasonableness." *See Graham v. Connor,* 109 S. Ct. 1865, 1867-68 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 1872.

In the context of deadly force, the Supreme Court has set out examples of factors that justify the use of such force:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon . . . deadly force may be used

> if necessary to prevent escape, and if, where feasible, some warning has been given.

Tennessee v. Garner, 105 S. Ct. 1694, 1701 (1985). *Garner* says something about deadly force but not everything, especially when facts vastly different from *Garner* are presented. The Supreme Court has cautioned that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott v. Harris*, 127 S. Ct. 1769, 1777 (2007).

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Graham,* 109 S. Ct. at 1872 (quoting *Bell v. Wolfish*, 99 S.Ct. 1861 (1979)) (alteration in original), we must "slosh our way through the factbound morass of 'reasonableness.'" *Scott,* 127 S. Ct. at 1778. Therefore, determining whether "the use of a particular type of force in a particular situation" is "reasonable" in the constitutional sense[6] requires a court to "balance the nature

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[6] The Fourth Amendment's "reasonableness" standard and the standard of "reasonable care" under tort law are not the same. An officer may fail to exercise "reasonable care" as a matter of state tort law yet still act reasonably in the federal constitutional sense. "The United States Constitution [and] traditional tort law . . . do not address the same concerns." *Daniels v. Williams*, 106 S. Ct. 662, 666 (1986) (concluding that "injuries inflicted by governmental negligence are not addressed by the United States Constitution") (Fourteenth Amendment case); *see also Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1324 (11th Cir. 2005) ("'Reasonable care' under

(Continued on following page)

and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott,* 127 S. Ct. at 1777, 1778 (quoting *United States v. Place,* 103 S. Ct. 2637, 2642 (1983)).

In examining whether an officer's use of deadly force is reasonable, we recognize that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham,* 109 S. Ct. at 1872. So "[w]e are loath to second-guess the decisions made by police officers in the field." *Vaughan v. Cox,* 343 F.3d 1323, 1331 (11th Cir. 2003).

Accepting the facts as alleged in the complaint as true, we conclude that Deputy Slaton's force was objectively reasonable under the Fourth Amendment. Although Slaton's decision to fire his weapon risked Long's death, that decision was not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if Long was allowed to flee in a stolen police cruiser. "[U]nder the law, the threat of danger to be assessed is not just the threat to officers at the moment, but also to the officers and other persons if the chase went on." *Pace v. Capobianco,* 283 F.3d 1275, 1280 n.12 (11th Cir. 2002). "[T]he question then is whether,

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tort law is not the same thing as reasonable safety within the meaning of the federal Constitution.") (Eighth Amendment case).

given the circumstances, [Long] would have appeared to reasonable police officers to have been gravely dangerous." *Id.* at 1281. Considering the circumstances surrounding the shooting, including the threat posed by Long's condition and behavior, this question must be answered "yes."

We stress these facts: Long was mentally unstable; and he had taken control of not just any vehicle, but a police cruiser. This police cruiser was marked as a Lauderdale County Sheriff's patrol car and was equipped with a flashing light bar on the roof, two police radios, and other emergency equipment. Under Alabama law, a motor vehicle is, at least, potentially a "dangerous instrument" – that is, an instrument "highly capable of causing death or serious bodily injury." Ala. Code § 13A-1-2(5). Different from other vehicles, this fully marked and fully equipped police cruiser had an even greater potential for causing – either intentionally or otherwise – death or serious bodily injury.

Even if we accept that the threat posed by Long to Deputy Slaton was not immediate in that the cruiser was not moving toward Slaton when shots were fired,[7] the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop

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[7] We note the obvious: Long could have quickly shifted gears and accelerated towards Deputy Slaton at any time. An objectively reasonable officer would have known this fact.

the suspect. *See Pace,* 283 F.3d at 1282 (concluding at the summary judgment stage that officers did not use excessive force in shooting a suspect who had stopped his vehicle after a high-speed chase – even though the court accepted that, at the time of the shooting, the suspect had neither tried to run over nor aimed the vehicle at officers); *Blanford v. Sacramento County,* 406 F.3d 1110, 1116-19 (9th Cir. 2005) (concluding that officers did not use excessive force in shooting a suspect who was carrying a sword, had failed to comply with orders to drop the sword, and was attempting to enter a house that – as far as the officers knew – might or might not have been empty, even though the suspect was at all times walking away from the officers and did not actually threaten the officers – or anyone else – with the weapon); *cf. Montoute v. Carr,* 114 F.3d 181, 185 (11th Cir. 1997) ("[A]n officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force.").[8]

Although at the point of the shooting Long had not yet used the police cruiser as a deadly weapon, Long's unstable frame of mind, energetic evasion of

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[8] *Montoute* is a qualified immunity decision. The person shot by police (who were responding to a report of shots fired) was carrying a sawed-off shotgun, walking away from officers, and ignoring warnings to drop the weapon; the person had not pointed the weapon at anyone, and the police did not know he was a shooter. 114 F.3d at 183, 185.

the deputy's physical control, Long's criminal act[9] of stealing a police cruiser, and Long's starting to drive – even after being warned of deadly force – to a public road gave the deputy reason to believe that Long was dangerous. *See Blanford,* 406 F.3d at 1117-19 (concluding that third volley of shots hitting sword-carrying suspect – who "appear[ed] intent on accessing a [place] . . . where his sword could inflict injury that the deputies would not then be in a position to prevent" – was not excessive force because "the deputies knew that Blanford had committed a crime, albeit not a violent one, and was continuing a course of conduct that objectively indicated he was not giving up the sword that made him a threat to anyone in charging range").

Protecting the innocent public from risks that are not remote is a government interest. *See Scott,* 127 S. Ct. at 1778 (noting the importance of the relative culpability of a fleeing driver who had ignored officers' warnings to stop as compared to the innocent public). Even a quick check of only published appellate decisions shows the risk of serious harm to the public in the circumstances facing Deputy Slaton was not imaginary. In many cases, people have stolen

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[9] Deputy Slaton had probable cause to believe that Long had committed at least two crimes under Alabama law, including at least one felony, by taking control of and attempting to flee in a stolen sheriff's cruiser: (1) unauthorized use of a vehicle, *see* Ala. Code § 13A-8-11(a)(1); and (2) theft of property in the first degree, *see* Ala. Code §§ 13A-8-2, 13A-8-3(b).

police vehicles and used them to engage in further criminal conduct or otherwise to harm innocent people. *See, e.g., People v. Hyde,* 166 Cal. App. 3d 463 (Cal. Ct. App. 1985) (man stole police vehicle, used it to stalk victim by impersonating police officer, and later pulled over, kidnaped, and murdered victim); *Chapman v. City of Quitman,* 954 So.2d 468 (Miss. Ct. App. 2007) (plaintiff sued city after member of angry mob snuck past officer, stole police cruiser, and used it to run down plaintiff who saw the cruiser approaching but thought it was driven by officers coming to his aid); *Rios v. City of Del Rio,* 444 F.3d 417 (5th Cir. 2006) (city police chief and officer were sued after escaped prisoner took possession of officer's patrol car and later crashed it into and severely injured customs enforcement officer assisting city police in chasing prisoner); *Griffin v. State,* 9 P.3d 301 (Alaska Ct. App. 2000) (man resisted arrest, stole police cruiser, put cruiser in reverse and rammed another cruiser injuring two officers inside, and attempted to run down other officers who shot and injured man, after which man smashed through officers' cruisers and led police on high-speed chase); *Bryant v. County of Los Angeles,* 26 Cal. App. 4th 919 (Cal. Ct. App. 1994) (county and sheriff's deputy were sued after man stole sheriff's patrol car, drove away, and caused accident that left another person a quadriplegic); *Duarte v. City of San Jose,* 100 Cal. App. 3d 648 (Cal Ct. App. 1980) (police officers and city were sued by homeowner who was hit by a stolen police car while he was mowing his lawn); *Pile v. City of Brandenburg,* 215 S.W.3d 36 (Ky. 2006) (city was

sued after officer left inebriated man in back of police cruiser with engine running and emergency lights flashing, after which man took control of cruiser, sped away, and crashed into another vehicle, killing himself as well as woman in other vehicle); *Thomas v. Gallant Ins. Co.*, 733 So.2d 1236 (La. Ct. App. 1999) (man took control of idling police vehicle, sped off to escape from officers, and then crashed head-on into another vehicle); *State Farm Mut. Auto. Ins. Co. v. Montagna*, 874 A.2d 406 (Me. 2005) (man ran from sheriff's detective, stole detective's cruiser, and then drove cruiser at and hit detective); *People v. Vasquez*, 341 N.W.2d 873 (Mich. Ct. App. 1983) (man took police car, drove away from police at excessive speeds, disobeyed traffic signals, and crashed into and killed motorcyclist); *Felty v. City of Lawton*, 578 P.2d 757 (Okla. 1977) (city was sued after man stole police cruiser, crashed head-on with another vehicle, resulting in death of woman); *Vaughn v. City of Tulsa*, 974 P.2d 188 (Okla. Ct. App. 1998) (city was sued after man was arrested and placed in back of police cruiser, after which he took control of cruiser and crashed into and injured victims); *Rowe v. City of Chattanooga*, 666 S.W.2d 469 (Tenn. Ct. App. 1983) (city was sued after officer left police cruiser running in parking lot, and man stole cruiser, drove away, and crashed into and injured other people); *Finnigan v. Blanco County*, 670 S.W.2d 313 (Tex. Ct. App. 1984) (county was sued after man stole county sheriff's vehicle, which led to chase and crash that killed woman). Failing to stop a psychotic man from driving away in a marked sheriff's cruiser not only would have provided the man

with a potentially (to say the least) lethal weapon, but also would have cloaked him with the apparent authority of a law enforcement officer.

The Supreme Court also has noted that providing a warning to a fleeing suspect weighs in favor of the reasonableness of using deadly force. *See Garner,* 105 S. Ct. at 1701 (noting the importance of a warning if feasible). Deputy Slaton gave clear warning of the intent to use deadly force before firing his weapon. Under the circumstances, we do not accept that Slaton's use of deadly force to stop Long from fleeing in the sheriff's cruiser was beyond the outside border of constitutionally reasonable conduct.

Plaintiffs argue that Long's death could have been avoided by using alternative means of apprehending Long such as shooting out the tires of the cruiser, using spike strips, or allowing Long to leave and then tracking the easily identifiable cruiser and arresting Long at a different location. We suppose that other means of stopping Long's escape existed that, if used, also might have prevented Long from harming others. But considering the unpredictability of Long's behavior and his fleeing in a marked police cruiser, "[w]e think the police need not have taken that chance and hoped for the best." *See Scott,* 127 S. Ct. at 1778 (responding to the argument that the police could have avoided the accident had they ceased their pursuit). The circumstances made the time to think short. Even if Deputy Slaton's decision to fire his weapon was not the best available means of preventing Long's escape and preventing potential

harm to others, we conclude that Slaton's use of deadly force was not an unreasonable means of doing so.

For these reasons, Plaintiffs' complaint fails to state a claim for the violation of Long's Fourth Amendment rights.[10]

B. Qualified Immunity

Even if Slaton's use of deadly force was excessive under the Fourth Amendment, we conclude alternatively that Defendants are entitled to qualified immunity because they, especially given the circumstances, violated no clearly established right. "[T]he purpose of the qualified immunity doctrine is to give meaning to the proposition that '[g]overnment officials are not required to err on the side of caution' when it comes to avoiding constitutional violations."

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[10] The complaint's only allegation about Sheriff Willis was that he "failed to institute a constitutionally compliant policy governing use of deadly force . . . and/or failed to properly and adequately train [Slaton] in regard to such a policy." Because Plaintiffs have failed to state a claim for the violation of a constitutional right, Plaintiffs' supervisory claims against Willis also fail. *See City of Los Angeles v. Heller*, 106 S. Ct. 1571, 1573 (1986) (concluding that whether police policies and regulations were proper is "beside the point" when "a person has suffered no constitutional injury at the hands of the individual police officer"); *Blyden v. Mancusi*, 186 F.3d 252, 265 (2d Cir. 1999) ("Of course, for a supervisor to be liable under Section 1983, there must have been an underlying constitutional deprivation.").

See Crosby v. Monroe, 394 F.3d 1328, 1334 (11th Cir. 2004) (quoting *Marsh v. Butler County,* 268 F.3d 1014, 1030 n.8 (11th Cir. 2001) (en banc)) (second alteration in original). For background, *see Hunter v. Bryant,* 112 S. Ct. 534, 537 (1991).

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 106 S. Ct. 1092, 1096 (1986); *accord Bashir v. Rockdale County,* 445 F.3d 1323, 1327 (11th Cir. 2006). Defendants, in their individual capacities, are entitled to qualified immunity unless their "supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances." *Pace,* 283 F.3d at 1282.

Pointing to law pre-existing the events in the pertinent case, Plaintiffs have the burden of demonstrating that Defendants – at the pertinent time and given the specific circumstances of this case – had fair notice that their conduct would violate clear federal law. *Vinyard v. Wilson,* 311 F.3d 1340, 1350 (11th Cir. 2002). To demonstrate that the law at the time clearly established that Defendants' conduct would violate the Constitution, Plaintiffs might point to either (1) earlier case law from the Supreme Court, this Court, or the highest court of the pertinent state that is materially similar to the current case and therefore provided clear notice of the violation or (2) general rules of law from a federal constitutional or statutory

provision or earlier case law that applied with "obvious clarity" to the circumstances, establishing clearly the unlawfulness of Defendants' conduct. *See Marsh,* 268 F.3d at 1031-33 & nn. 9-10; *Willingham v. Loughnan,* 321 F.3d 1299, 1301-03 (11th Cir. 2003); *Vinyard,* 311 F.3d at 1349-53. And "where the applicable legal standard is a highly general one, such as 'reasonableness,' preexisting case law that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law." *Thomas v. Roberts,* 323 F.3d 950, 954 (11th Cir. 2003).

Plaintiffs have failed to cite controlling and materially similar case law that would establish that Deputy Slaton's use of deadly force was clearly unlawful. Plaintiffs cite *Vaughan,* 343 F.3d 1323, as a materially similar case. But it is factually too different.

We do not read *Vaughan* as capable of putting every objectively reasonable officer on notice that deadly force could not be used in the circumstances presented in this case. In *Vaughan,* this Court concluded that an officer used unreasonable force when he, without warning, discharged his firearm at suspects fleeing in a stolen truck. *See id.* at 1330-32. The present case has, at least, three additional facts not present in *Vaughan* and that an objectively reasonable police officer could believe "might make a difference" for whether the conduct in the present instance would violate federal law. *See generally Marsh,* 268

F.3d at 1032 (discussing when pre-existing precedents cannot clearly establish the applicable law). In this case, unlike *Vaughan,* the fleeing driver was in an unstable frame of mind, had taken possession of a marked police cruiser, and had been warned that deadly force would be used if he did not leave the cruiser. Therefore, we believe that the situation in *Vaughan* is too different from this case to cause every objectively reasonable officer to know that the use of deadly force in the circumstances of this case must violate federal law.

Plaintiffs also attempt to rely on *Garner,* 105 S. Ct. 1694, as having clearly established broad principles that cover the contours of this case with obvious clarity. As the Supreme Court recently pointed out, however, "[w]hatever *Garner* said about the factors that might have justified shooting the suspect in that case, such 'preconditions' have scant applicability to this case, which has vastly different facts."[11] *Scott,* 127 S. Ct. at 1777.

> [W]hen we look at decisions such as *Garner* and *Graham,* we see some tests to guide us in determining the law in many different

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[11] "*Garner* held that it was unreasonable to kill a 'young, slight, and unarmed' burglary suspect by shooting him 'in the back of the head' while he was running away on foot and when the officer 'could not reasonably have believed that [the suspect] . . . posed any threat,' and 'never attempted to justify his actions on any basis other than the need to prevent escape.'" *Scott,* 127 S. Ct. at 1777 (internal citation omitted) (alteration in original).

> kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply with such obvious clarity to the circumstances of this case that only an incompetent officer or one intending to violate the law could possibly fail to know that what the police did here violated federal law.

Pace, 283 F.3d at 1283 (shooting of a fleeing suspect in vehicle); *accord Brosseau v. Haugen,* 125 S. Ct. 596, 599 (2004) (same). Simply put, the Supreme Court's decision in *Garner* – which does not involve a fleeing motor vehicle – offered little insight on whether an officer, consistently with the Fourth Amendment, may use deadly force to stop a man who has stolen a police cruiser and has been given clear warnings about the use of deadly force. *Garner* does not apply to the circumstances of this case with obvious clarity.

Nor does this case present otherwise an obvious violation of Long's rights under the Fourth Amendment. We do not believe that every objectively reasonable officer in Deputy Slaton's position must have known that firing his weapon at the police cruiser under these circumstances would be an unconstitutional application of force. Results in these kinds of cases – involving reasonableness and balancing – are extremely fact dependent; at worst, Deputy Slaton's acts fell within the "hazy border between excessive and acceptable force.'" *Saucier,* 121 S. Ct. at 2158 (quoting *Priester v. Riviera Beach,* 208 F.3d 919, 926-27 (11th Cir. 2000)). Therefore, because preexisting

law did not provide fair warning that shooting at Long in this situation would violate federal law, Defendants are entitled to qualified immunity.[12]

III. Conclusion

Accepting the allegations in Plaintiffs' complaint as true, we conclude that Plaintiffs have failed to state a claim for a violation of Long's Fourth Amendment rights. Deputy Slaton's use of deadly force was constitutionally reasonable under the circumstances. Even if Plaintiffs could establish that Slaton's use of deadly force was excessive under the Fourth Amendment, the applicable law was not already clearly established at the time of the shooting. Thus, the district court erred in denying Defendants' motion to dismiss.

REVERSED and REMANDED.

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[12] Even if Slaton's use of deadly force was excessive under the Fourth Amendment, Sheriff Willis was also entitled to qualified immunity. We do not believe that a failure to implement and train officers on a deadly force policy that covers the circumstances of this case constitutes a deliberate indifference to Long's constitutional rights; nor do we believe that such a conclusion was clearly established at the time of the shooting.

FORRESTER, District Judge, concurring in part and dissenting in part:

I respectfully dissent from the opinion of the majority in the action against Deputy Slaton.

To the recitation of the facts by the majority, I would add that Deputy Slaton had dealt with the deceased before without any major problem and that the shooting occurred in a fairly rural area several miles from Florence, Alabama.

As I understand the law, the use of deadly force is reasonable only where there is a serious threat of imminent or immediate physical harm to the officer or others. *See, e.g., Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985); *Beshers v. Harrison,* 495 F.3d 1260, 1266-67 (11th Cir. 2007); *Robinson v. Arrugueta,* 415 F.3d 1252, 1256-57 (11th Cir. 2005); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir. 2003); *McCormick v. City of Fort Lauderdale,* 333 F.3d 1234, 1246 (11th Cir. 2003). I can find no arguable probable cause for such a belief in this case. To be sure, with the deceased in possession of a patrol car, the outcome of these events is uncertain, but the possibility that a nonviolent fleeing felon will later pose a threat of physical harm to others is remote and highly speculative.

I do not believe that this officer is entitled to qualified immunity either. *Vaughan* provides notice that seizing a fleeing felon in a vehicle by shooting him is unreasonable. Although there are differences between that case and this, *Vaughan* is not "fairly

distinguishable." *See Vinyard v. Wilson,* 311 F.3d 1340, 1351-53 (11th Cir. 2002). In *Vaughan,* the truck was northbound on I-85 between Newnan and Atlanta traveling at speeds exceeding eighty miles per hour. At one point it rammed a police vehicle which was attempting a rolling roadblock. These facts present circumstances more fraught with immediate threat than those in the instant case, and this court determined that a jury could find that the officers in *Vaughan* violated the suspect's Fourth Amendment rights and were not entitled to qualified immunity.[1]

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[1] I concur in the majority opinion's determination that the plaintiffs have failed to state a claim against Sheriff Ronnie Willis.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
NORTHWESTERN DIVISION**

ROBERT R. LONG and KELLY L. LONG as Personal Representatives of the Estate of Bryant L. Long, deceased,	)	
Plaintiffs,	)	CV 06-J-1014-NW
vs.	)	
JIMMY RAY SLATON, JR., and RONNIE WILLIS,	)	
Defendants.	)	

ORDER

(Filed Jul. 11, 2006)

Pending before the court is defendants Lauderdale County Sheriff Ronnie Willis and Deputy Sheriff Jimmie Slaton, Jr.'s motion to dismiss (doc. 7), and the court having considered said motion, brief in support (doc. 8), and plaintiffs' brief in opposition (doc. 10), and the court being of the opinion that the motion to dismiss is due to be denied,[1]

It is therefore ORDERED that said motion is DENIED.

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[1] Plaintiffs are not suing defendants in their official capacities. Pla. response at 9.

DONE and **ORDERED** this 11th day of July 2006.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14439

D.C. Docket No. 06-01014-CV-3-IPJ

ROBERT R. LONG,
Kelly L. Long, as Personal
Representatives of the Estate
of Bryan L. Long, deceased,

Plaintiffs-Appellees,

versus

JIMMIE RAY SLATON, JR.,
Ronnie Willis,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION FOR REHEARING EN BANC

(Filed May 27, 2008)

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, and PRYOR, Circuit Judges.

ORDER:

The Court having been polled at the request of one of the members of the Court and majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

/s/ J.L. Edmondson
CHIEF JUDGE